

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

HEALTHY HOMES INC., a Michigan
Corporation,

Plaintiff,

vs.

Case No. 2005-1036-CH

JOSEPH ALAN & ASSOCIATES, LLC, f/k/a
JOSEPH ALLEN & ASSOCIATES, LLC, a
Michigan limited liability company; SHIRLEY
L. MAYERNIK, an individual; STANDARD
FEDERAL BANK, a Michigan corporation;
ABN AMRO MORTGAGE GROUP, INC., a
Delaware corporation authorized to do business
in Michigan; RUCKER ENTERPRISE, INC., a
Michigan corporation; CONSUMERS LUMBER
COMPANY, a Michigan corporation; CIRAULO
BROTHERS BUILDING COMPANY, d/b/a
SQUARE DEAL BUILDING SUPPLY, a
Michigan corporation; CRAIG MISERLIAN, an
individual;

Defendants.

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OPINION AND ORDER

Several motions are pending before the Court. (1) Defendant Shirley Mayernik has brought a motion to deem her responses to plaintiff's requests for admissions timely filed, and to amend or withdraw these responses; (2) plaintiff Healthy Homes has brought a motion for summary disposition on its lien foreclosure; and (3) defendants Joseph Alan & Associates, LLC, and Craig Miserlian have brought a motion to enforce the case evaluation summary and dismiss them from this case.

Plaintiff filed this complaint on March 15, 2005. Plaintiff alleges that it entered into a



contract with general contractor Joseph Alan & Associates, LLC, to provide mold remediation services on defendant Mayernik's house. Plaintiff maintains that it performed its contractual obligations, but has not been paid for its work. Plaintiff avers that it is owed more than \$80,328.50 for this work. Plaintiff alleges that it served timely notices of furnishing on both the general contractor and the homeowner, and filed the same with the Macomb County Register of Deeds. Plaintiff also alleges that it timely filed a claim of lien in the Macomb County Register of Deeds. Plaintiff thus brings Count I, for breach of contract, as to Joseph Alan; Count II, for builder's trust fund violations, as to Joseph Alan and Miserlian; Count III, for judicial foreclosure of its lien, as to all defendants; Count IV, for unjust enrichment, as to all defendants; and Count V, for account stated, as to Joseph Alan.

The Court shall address each of the pending motions in turn, beginning with defendant Mayernik's motion to deem her responses to plaintiff's requests to admit timely filed, and to amend or withdraw her admissions.

Defendant Mayernik's Motion to Have the Court Declare Responses to Requests for Admissions Timely Filed, to Amend and/or Allow Withdrawal of Admissions

A trial court's decision as to whether to deem untimely answers to a request for admissions to be admitted is reviewed for an abuse of discretion. *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991) (citation omitted). "An abuse of discretion will only be found if an unprejudiced person, upon considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id.* at 557 (citation omitted).

In support of this motion, defendant Mayernik first argues that plaintiff failed to file the requests to admit within a reasonable time after service. Mayernik also argues that plaintiff's counsel agreed to extend the time to respond to the requests to admit, and led her and her attorney to believe that plaintiff would not claim that the requests to admit were deemed

admitted. Therefore, Mayernik avers that this Court should deem her original responses to plaintiff's requests for admissions to have been timely filed. Next, Mayernik requests that this Court allow her to amend or withdraw her prior admissions. She claims that there is good cause for allowing her to amend or withdraw, and argues that amendment or withdrawal will not eliminate a trial on the merits, that amendment or withdrawal will not prejudice plaintiff, and that her delay was inadvertent. Mayernik also appears to argue that she must supplement her discovery responses based on new information that she has discovered.¹

In response, plaintiff claims that Mayernik failed to file answers to the requests for admissions and the requests are therefore deemed conclusively admitted. Plaintiff claims that it filed its requests to admit with this Court within a reasonable time after service. Plaintiff maintains that its counsel did not agree to extend the time to respond to the requests to admit. Plaintiff urges that Mayernik failed to request additional time to respond to plaintiff's requests for admissions. Plaintiff also urges that Mayernik failed to supplement her answers when information became known to her, and only now attempts to supplement her discovery responses in order to avoid summary disposition. Plaintiff also claims that Mayernik is improperly attempting to present new expert witnesses in this matter. Plaintiff maintains that it was not responsible for testing the air in Mayernik's home or providing a report on such testing, and thus avers that Mayernik's allegations to this effect are neither relevant, admissible, or discoverable. Finally, plaintiff claims that it would be unfairly prejudiced if Mayernik were allowed to amend, withdraw or supplement her discovery responses.

The Court shall first address Mayernik's request that her original responses to the

¹ In the motion itself, Mayernik specifically requests the Court to "(a) allow the supplemental [sic.] and/or withdrawal of prior admission; (b) deem the original responses to request to admit timely[;] (c) rule the original response[s] to requests to admit were timely filed due to an extension and the dismissal of Plaintiff's motion; (d)

requests for admissions be deemed timely filed. Contrary to Mayernik's contention, whether plaintiff ever filed a copy of its requests for admissions with this Court within a reasonable time after service has no bearing whatsoever on whether she herself responded to these requests in a timely fashion. Nevertheless, Mayernik has provided an affidavit from her attorney indicating that he understood plaintiff's counsel to have agreed to extend the time for answering the requests for admissions. Moreover, plaintiff dismissed its motion to compel compliance with discovery and for an order denying withdrawal of Mayernik's admissions. On the basis of these considerations, the Court finds that Mayernik's counsel at the very least had a good faith belief that plaintiff's attorney agreed to extend the time to file responses to interrogatories and requests for admissions. Therefore, the Court finds that Mayernik's original responses to the requests for admissions were timely filed.

The Court now turns to Mayernik's request to amend or withdraw her admissions. MCR 2.312(D)(1) provides that any matter admitted pursuant to a request for admission is "conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission." The trial court may allow such an amendment or withdrawal for good cause at any time. *Brill v Brill*, 75 Mich App 706, 710-711; 255 NW2d 739 (1977). In determining whether good cause exists, the court should temper the severity of the sanction for filing late answers by considering the equities involved in the case. See *Janczyk v Davis*, 125 Mich App 683, 692; 337 NW2d 272 (1983) (citation omitted). Among other things, the court should consider whether allowing the party to amend or withdraw (1) will eliminate the trial on the merits, (2) will prejudice the nonmoving party, and (3) was intentional or inadvertent. *Id.* at 692-693.

barring [sic.] the use of the admissions as Plaintiff did not file the requests with the Court before or within a

As a preliminary matter, the Court notes that plaintiff's reliance on *Kalkaska Environmental Services, Inc v The Barrett Co, Inc*, unpublished opinion of the Court of Appeals, issued Nov. 28, 2000 (Docket No. 215763), is misplaced. Apart from the fact that the case is unpublished, and thus lacks the authority of binding precedent, the Court believes that *Kalkaska* is readily distinguishable from the case at bar. Unlike the situation in the present case, the defendant in *Kalkaska* never filed a motion to withdraw or amend its admissions. Rather, the defendant in that case waited until after the trial court had entered an order for partial summary disposition based on defendant's admissions, and only *then* filed objections to the trial court's order.

Next, the Court is satisfied that the equities in this matter favor defendant Mayernik. Having carefully considered the parties' positions, Mayernik appears to have essentially been little more than an innocent bystander in this matter. Nothing presented to this Court suggests that Mayernik was necessarily aware of the various agreements between her homeowner's insurance provider, the general contractor, and plaintiff, which have led to the current lawsuit.

Furthermore, applying the specific factors outlined in *Janczyk* to the case at bar, the Court finds that there is good cause to allow Mayernik to amend or withdraw her admissions. First of all, allowing Mayernik to amend her responses increases the likelihood of a trial on the merits by creating genuine issues of fact. Not allowing Mayernik to amend her responses would more likely abrogate the need for a trial on the merits, especially in light of plaintiff's motion for summary disposition.

Second, plaintiff will not be prejudiced by allowing Mayernik to amend or withdraw her responses. Plaintiff claims that it has relied on Mayernik's admissions in preparing for trial.

However, Mayernik alleges that she has discovered new and pertinent information, and has informed plaintiff of this information as it has been discovered. Specifically, Mayernik swears that her son and grandchildren became sick after staying at her house. She provides a letter from Healthy Homes' attorney advising her that *if* there is a mold problem, immediate testing is required to avoid potential health risks. She incorrectly construes this letter as an admission by plaintiff that its attempt at mold remediation was unsuccessful. However, by suggesting that Mayernik could be subjecting herself to "grave health risks," the Court is satisfied that this letter prompted Mayernik to have the house re-tested for mold contamination. The re-testing led to the discovery of new information, allegedly indicating that the home never should have passed clearance testing in the first place, and rendering Mayernik's earlier responses and admissions inaccurate.²

There is little danger that plaintiff will be unfairly surprised by allowing Mayernik to amend or withdraw her responses to correct her earlier, allegedly inaccurate responses, since plaintiff performed the allegedly inferior work in the first place. Further, Mayernik claims that it now appears that plaintiff proactively sought to disguise its failure to properly remediate the mold. For example, plaintiff allegedly used a pigmented encapsulant in order to hide the mold contamination throughout the house. Since Mayernik's request to amend or withdraw her responses concerns problems ostensibly caused by plaintiff's own actions, the Court is satisfied that plaintiff will not be taken unawares and unduly prejudiced by granting this relief.

² According to Mayernik, the subsequent test showed that improper encapsulants had been applied, and that there was visible mold growing in several areas of the house. Moreover, Mayernik alleges that plaintiff did not disclose the results of the clearance test conducted by Sanitair at the completion of the remediation until June 9, 2006. Mayernik claims that Sanitair did not test all of the rooms in her house during its initial inspection. She maintains that the inspection Sanitair performed shortly before remediation was completed showed that there were still large amounts of visible mold present throughout the house. Mayernik claims that plaintiff has performed a second inspection of her home, but has not disclosed the results of the inspection.

Third, the Court finds that Mayernik's alleged failure to appropriately respond to the requests for admissions in the first instance was inadvertent. Mayernik's attorney did not intentionally engage in dilatory practices; rather, Mayernik's attorney had a good faith belief that plaintiff's attorney had agreed to an extension. Furthermore, Mayernik had no cause to amend or withdraw her responses earlier, and only seeks to do so now because of her recent discoveries.

Upon careful consideration of the factors outlined in *Janczyk*, the Court finds that good cause exists to allow Mayernik to amend or withdraw her admissions, and her request to amend or withdraw her admissions should be granted.

The Court notes that Mayernik briefly raises the issue of supplementation in her brief. MCR 2.302(E)(1)(b) provides that "[a] party is under a duty seasonably to amend a prior response if the party obtains information" indicating that "the response was incorrect when made; or . . . though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." To the extent that Mayernik has discovered new information, the Court is satisfied that she must supplement her discovery responses.

*Plaintiff's Motion for Summary Disposition of
Lien Foreclosure under MCR 2.116(C)(10)*

The Court now turns to plaintiff's motion for summary disposition of its count for lien foreclosure. Plaintiff brings this motion under MCR 2.116(C)(10). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party

opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

In support of this motion for summary disposition, plaintiff argues that it has a valid construction lien on Mayernik's house. Plaintiff claims that it provided a timely notice of furnishing, but argues that even if it had not, failure to provide notice of furnishing only defeats the lienholder's rights to the extent that payments were made pursuant to the contractor's sworn statement or waiver of the lien. Plaintiff argues that, as a subcontractor, it was not required to have a contract with Mayernik. Plaintiff contends that Mayernik has conclusively admitted that its notice of furnishing was timely and its claim of lien is valid and enforceable. Plaintiff argues that Mayernik cannot raise the invalidity of the notice of furnishing or the claim of lien since she did not raise these issues as affirmative defenses. Plaintiff maintains that it was not required to provide Mayernik with a sworn statement since she did not request one at the time of payment. Plaintiff also claims that Mayernik has provided no evidence contradicting the amount of its claimed lien. Plaintiff asserts that it has a valid lien regardless of who agreed to pay for its work or whether other defendants violated their builder's trust fund obligations. Finally, plaintiff claims that Mayernik's allegation that plaintiff failed to properly perform the services it undertook is the quintessential affirmative defense, and has been abandoned since it was not raised in her first responsive pleading.

In response, defendant Mayernik argues that plaintiff's lien is invalid for want of a written contract authorizing plaintiff to perform the work in question. Mayernik next argues that plaintiff's lien is invalid since plaintiff failed to timely file a notice of furnishing, and since the lien itself was filed late. Mayernik avers that plaintiff is not entitled to payment until a sworn

statement is provided to her. She argues that questions of fact exist as to the validity of amounts charged by plaintiff, plaintiff's payment arrangement with Citizens Insurance Company (her homeowner's insurance provider), and whether defendants Joseph Alan and Craig Miserlian violated the builder's trust fund act. She maintains that any judgment against her must be offset by the amounts plaintiff has received from its settlements with other defendants in this matter. Lastly, Mayernick claims that the work undertaken by plaintiff was not performed properly.

There are a number of genuine issues of material fact which preclude summary disposition of this matter pursuant to MCR 2.116(C)(10). At the outset, however, the Court reiterates that Mayernick's responses to plaintiff's requests for admissions were timely under the circumstances. Moreover, Mayernick's request to amend or withdraw these responses, and supplement her other discovery responses, is properly granted for the reasons discussed above. As such, plaintiff is not entitled to summary disposition on the basis of Mayernick's purported admissions.

Next, the parties dispute whether plaintiff timely filed the lien at issue. A construction lien must be filed 90 days after the furnishing of labor and materials. MCL 570.1111. "Substantial compliance" with this section of the construction lien act is not permitted, since "the most reasonable interpretation of '90 days' is precisely '90 days,'" especially since "the statute emphasizes that the lien 'cease[s] to exist' if not recorded within the ninety-day deadline." *Northern Concrete Pipe, Inc v Sinacola*, 461 Mich 316, 323; 603 NW2d 257 (1999). Mayernick provides documentary evidence indicating that plaintiff had completed its work by March 26, 2004. Mayernick's Post-Hearing Brief, Exhibit 1, Letter. The lien, however, was not filed until July 9, 2004, well more than 90 days after the last work appears to have been completed. Mayernick's Post-Hearing Brief, Exhibit 4, Claim of Lien. While plaintiff disputes this, and

claims to have continued performing work well into May, this merely raises a genuine issue of material fact. Therefore, plaintiff's motion for summary disposition of its claim for lien foreclosure is properly denied. Since plaintiff's motion for summary disposition is properly denied on this basis, it is unnecessary for the Court to consider the parties' remaining arguments concerning summary disposition.

Nevertheless, although not necessary to the disposition of the present motion, the Court shall briefly address plaintiff's contention that Mayernik is precluded from asserting that the mold remediation services at issue were improperly performed. The Court agrees with plaintiff that Mayernik's allegations to this effect most likely constitute an affirmative defense that was not raised in her answer to plaintiff's complaint. While leave to amend a pleading shall be freely given when justice so requires, Mayernik has not yet requested leave to amend her answer to include the aforementioned affirmative defense. Therefore, unless Mayernik brings a motion to amend her answer and this Court has the opportunity to rule on such a motion, Mayernik will be precluded from asserting that plaintiff failed to perform its contractual obligations as an affirmative defense.

Defendants Joseph Alan & Associates, LLC, and Miserlian's Motion to Enforce the Case Evaluation Summary and Dismiss Them from the Case

Finally, the Court shall address Joseph Alan & Associates, LLC, and Miserlian's motion to enforce the case evaluation summary. In support of this motion, they argue that plaintiff accepted the case evaluation as to Joseph Alan, and accepted the case evaluation as to Miserlian conditioned on Joseph Alan's acceptance. Both Joseph Alan and Miserlian also accepted the case evaluation. The conditions having been met, they argue that the Court must enforce the case evaluation.

In response, plaintiff essentially claims that, if defendant Mayernik is allowed to amend its discovery responses or raise new affirmative defenses, equity demands that the change in circumstances must negate their prior acceptance of the case evaluation. Plaintiff claims that any settlement pursuant to the case evaluation "would be inappropriate now that the specter of tort or statutory liability has been raised" by Mayernik. Alternatively, plaintiff notes that the Court Rules do not specify when a judgment pursuant to acceptance of case evaluation must be entered, and requests that the Court wait until the trial is over to enter judgment.

In a case involving multiple parties, judgment "shall be entered as to those opposing parties who have accepted those portions of the evaluation that apply to them." MCR 2.403(M). Nevertheless, it is within the trial court's discretion to set aside acceptance of a case evaluation prior to the entry of a judgment on the award. *Reno v Gale*, 165 Mich App 86, 92-93; 418 NW2d 434 (1987) (citation omitted). The court should set aside a judgment on the acceptance only if failure to do so would result in substantial injustice, and should strike a balance between remedying injustice and achieving finality in litigation. *Id.* (citations omitted).

This Court's decision to deem defendant Mayernik's responses to plaintiff's requests for admissions timely, and to allow her to amend or withdraw these responses, changes the circumstances under which plaintiff accepted the case evaluation as to defendants Joseph Alan and Miserlian. As such, the Court is satisfied that plaintiff would be suffer substantial injustice if it is bound by its erstwhile acceptance of the case evaluation. Therefore, Joseph Alan and Miserlian's request to enter judgment on the case evaluation must be denied.

For the reasons set forth above, defendant Shirley Mayernik's request that her original responses to plaintiff's requests for admissions be deemed timely is GRANTED. Defendant Mayernik's request to amend or withdraw her responses to the requests for admissions is also

GRANTED. Defendant Mayernik is ORDERED to amend or withdraw her responses to the requests for admissions, and supplement her other discovery responses, within fourteen (14) days. Plaintiff's motion for summary disposition of its count for lien foreclosure is DENIED. Defendants Joseph Alan & Associates, LLC, and Craig Miserlian's motion to enforce the case evaluation summary and dismiss them from the case is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

Dated: July 31, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Lynn F. McGuire
Heather L. Miserlian
Steven F. Dobreff
Michael J. Thomas
Robert A. Binkowski

DONALD G. MILLER
CIRCUIT JUDGE

JUL 31 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

BY:  Court Clerk